

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEVEN D. SPELLMAN,)	
)	No. CV-07-5063-JPH
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR ADDITIONAL
MICHAEL J. ASTRUE,)	PROCEEDINGS PURSUANT TO
Commissioner of Social)	SENTENCE FOUR 42 U.S.C. §
Security,)	405(g)
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 21.) Attorney Jeannine LaPlace represents Plaintiff; Special Assistant United States Attorney David Blume represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

On April 20, 2004, Plaintiff Steven Spellman (Plaintiff) filed for disability insurance benefits (DIB) and supplemental security income benefits (SSI). (Tr. 51-58.) Upon initial application, plaintiff alleged disability since December of 2002 due to chronic

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SENTENCE FOUR 42 U.S.C. § 405(g)-1

1 fatigue, chest muscle spasms, degenerative disc disease, hepatitis C,
2 a pinched nerve, ankle pain and weakness, and bone spurs in his right
3 foot. (Tr. 51.) Benefits were denied initially and on reconsideration.
4 (Tr. 34-36, 38-39.) Plaintiff requested a hearing before an
5 administrative law judge (ALJ), which was held before ALJ Richard A.
6 Say on November 14, 2006. (Tr. 407-431.) Plaintiff, who was present
7 and represented by counsel, and vocational expert Dennis J. Elliott,
8 testified. The ALJ denied benefits and the Appeals Council denied
9 review. (Tr. 6-8, 28.) The instant matter is before this court
10 pursuant to 42 U.S.C. § 405(g).

11 **STATEMENT OF THE CASE**

12 The facts of the case are set forth in detail in the transcript
13 of proceedings, and are briefly summarized here. Plaintiff was 49
14 years old at onset and 53 at the time of the hearing. (Tr. 409.)
15 Plaintiff has a high school education. (*Id.*) He has past work
16 experience as a telephone maintenance mechanic and construction
17 worker. (Tr. 424.) He testified he lives with his father and cooks,
18 drives, shops and does laundry. (Tr. 414.) Plaintiff testified that
19 he planned to undergo treatment in January of 2007 [about two months
20 after the hearing] for hepatitis. Treatment could not be started
21 until he reached six months of sobriety. (Tr. 412.) He testified he
22 suffers from back pain, emphysema, chest pain, pain radiating down his
23 legs from pinched nerves, a hiatal hernia, and fatigue. (Tr. 411,
24 413, 416.) Plaintiff testified he could lift ten pounds and stand 15
25 minutes. (Tr. 416.)

26 **ADMINISTRATIVE DECISION**

27 ALJ Say found plaintiff met the insured status requirements for
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1 DIB through December 31, 2007. (Tr. 17, 19.) At step one of the
2 sequential evaluation, the ALJ found plaintiff had not engaged in
3 substantial gainful activity since the onset date of December 1, 2002.
4 (Tr. 19.) At steps two and three, he found plaintiff had the severe
5 impairments of degenerative disc disease, chronic obstructive
6 pulmonary disease, and hepatitis C (Tr. 19), but these impairments
7 alone or in combination did not meet or equal one of the listed
8 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
9 (Listings). (Tr. 23.) The ALJ found plaintiff less than fully
10 credible. (Tr. 25.) He determined plaintiff had the residual
11 functional capacity (RFC) to perform a wide range of light work. (Tr.
12 23, 27.)

13 At step four, based on vocational expert testimony, the ALJ
14 determined plaintiff could not perform his past relevant work. (Tr.
15 26.) At step five, also relying on the VE's testimony, the ALJ found
16 plaintiff had transferable skills and could work at the light level as
17 a testing and regulating technician, or at the sedentary level at a
18 trouble locator test desk. (Tr. 27, 426-427.) Therefore, plaintiff
19 was not found "disabled" as defined in the Social Security Act at any
20 time through the date of the ALJ's decision. (Tr. 27-28.)

21 STANDARD OF REVIEW

22 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
23 court set out the standard of review:

24 A district court's order upholding the Commissioner's
25 denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211
26 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
27 Commissioner may be reversed only if it is not supported by
28 substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098. Put

another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b),

1 404.1513(d)).

2 It is the role of the trier of fact, not this court, to resolve
3 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
4 supports more than one rational interpretation, the court may not
5 substitute its judgment for that of the Commissioner. *Tackett*, 180
6 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
7 If there is substantial evidence to support the administrative
8 findings, or if there is conflicting evidence that will support a
9 finding of either disability or non-disability, the finding of the
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
11 1230 (9th Cir. 1987). Nevertheless, a decision supported by
12 substantial evidence will still be set aside if the proper legal
13 standards were not applied in weighing the evidence and making the
14 decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
15 432, 433 (9th Cir. 1988).

16 ISSUES

17 The question is whether the ALJ's decision is supported by
18 substantial evidence and free of legal error. Specifically, plaintiff
19 argues the ALJ erred by failing to fully credit the opinion of
20 treating physician Dr. Vides, by finding radiculopathy a non-severe
21 impairment at step two, and in assessing credibility. The first issue
22 is dispositive.

23 DISCUSSION

24 A. Treating Physician's Opinion

25 Plaintiff alleges the ALJ failed to properly credit the opinion
26 of his treating physician, Eduardo Vides, M.D. (Ct. Rec. 18 at 16-19.)
27 The Commissioner responds that, to the extent the ALJ rejected some of
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1 Dr. Vides's opinions, he properly rejected them as based on
2 plaintiff's discredited subjective complaints. (Ct. Rec. 22 at 8-10.)

3 In social security proceedings, the claimant must prove the
4 existence of a physical or mental impairment by providing medical
5 evidence consisting of signs, symptoms, and laboratory findings; the
6 claimant's own statement of symptoms alone will not suffice. 20
7 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
8 the basis of a medically determinable impairment which can be shown to
9 be the cause of the symptoms. 20 C.F.R. § 4416.929. Once medical
10 evidence of an underlying impairment has been shown, medical findings
11 are not required to support the alleged severity of the symptoms.
12 *Bunnell v. Sullivan*, 947 F. 2d 341, 345 (9th Cir. 1991).

13 A treating or examining physician's opinion is given more weight
14 than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.
15 3d 587, 592 (9th Cir. 2004). If the treating or examining physician's
16 are not contradicted, they can be rejected only with clear and
17 convincing reasons. *Lester v. Chater*, 81 F. 3d 821, 830 (9th Cir.
18 1996). If contradicted, the ALJ may reject an opinion if he states
19 specific, legitimate reasons that are supported by substantial
20 evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44 F. 3d
21 1453, 1463 (9th Cir. 1995). In addition to medical reports in the
22 record, the analysis and opinion of a non-examining medical expert
23 selected by the ALJ may be helpful to the adjudication. *Andrews v.*
24 *Shalala*, 53 F. 3d 1035, 1041 (9th Cir. 1995) (citing *Magallanes v.*
25 *Bowen*, 881 F. 2d 747, 753 (9th Cir. 1989). Testimony of a medical
26 expert may serve as substantial evidence when supported by other
27 evidence in the record. *Id.*

1 Treating physician Eduardo Vides, M.D., noted in June of 2003
2 that plaintiff suffered from hepatitis C and chronic low back pain.
3 (Tr. 290.) He began plaintiff on a course of prednisone. (Id.) Dr.
4 Vides continued to treat plaintiff (along with several other treatment
5 providers). Two years later, in June of 2005, Dr. Vides opined
6 plaintiff: (1) could sit four hours out of eight, and stand or walk
7 one hour in eight; (2) would likely experience increased symptoms if
8 placed in a competitive work environment; (3) experiences pain,
9 fatigue or other symptoms that are "frequently to constantly" severe
10 enough to interfere with attention and concentration; (4) is incapable
11 of tolerating even low stress due to COPD, hepatitis C, and chronic
12 back pain; (5) requires 5 unscheduled breaks a day, each for 15
13 minutes; and (6) will likely miss work more than 3 times monthly
14 because of impairments or treatment. (Tr. 344, 346-348.) These
15 limitations indicate that plaintiff would be unable to work at full-
16 time competitive employment.

17 Nearly a year later, on May 24, 2006, Dr. Vides assessed the same
18 impairments, again of such severity that full-time competitive
19 employment would be precluded. (Tr. 360-364.)

20 The ALJ explicitly gives Dr. Vides's opinion little weight (Tr.
21 26) but states three times that "Dr. Vides concluded in September 2005
22 that the claimant was capable of sedentary work." (Tr. 23, 23, and 26,
23 referring to Exhibit 18F.) The ALJ's emphasis on the assessment for
24 sedentary work is misplaced for two reasons. By focusing on a single
25 statement in September 2005, the ALJ seems to disregard Dr. Vides's
26 later opinion in May of 2006 that plaintiff is incapable of
27 competitive full-time employment.

1 Perhaps more importantly, in the same exhibit the ALJ refers to,
2 Exhibit 18F (Tr. 353-355, examination dated 10/15/2005), Dr. Vides
3 opines that active hepatitis C causes marked impairment in the ability
4 to perform one or more basic work-related activities. Marked is
5 defined as "very significantly interfering" with the ability to
6 perform at least one basic work-related activity. In Exhibit 18F, Dr.
7 Vides opines that COPD and chronic low back pain cause plaintiff to
8 suffer from moderately severe impairments, defined as significantly
9 interfering with the ability to perform at least one basic work-
10 related activity. (Tr. 354.)

11 On the lower half of Exhibit 18F, Dr. Vides wrote "sedentary,"
12 indicating plaintiff's "overall work level." (Tr. 354.) Exhibit 18F
13 defines sedentary as: "The ability to lift 10 pounds maximum and
14 frequently lift and/or carry such articles as files and small tools.
15 A sedentary job may require sitting, walking and standing for **brief**
16 **periods.**" (Tr. 354)(emphasis added.) As the plaintiff correctly
17 points out, the definition of sedentary work in Exhibit 18F is
18 consistent with Dr. Vides's other assessed limitations, including the
19 ability to stand or walk for no more than an hour and sit no more than
20 four hours in an eight-hour day. (Ct. Rec. 18 at 17.) It is
21 inconsistent with the regulatory definition of sedentary work, which
22 requires an ability to sit for six out of an eight hour day. See 20
23 C.F.R. § 404.1567; SSR 83-10/

24 The ALJ gave Dr. Vides's opinion of plaintiff's limitations,
25 other than the assessment for "sedentary work," little weight:

26 Dr. Vides concluded in September 2005 that the claimant
27 was capable of sedentary work. However, just a few
28 months earlier, he had reported the claimant could only
lift up to 10 pounds occasionally, sit four hours in an

1 eight-hour day, and stand and walk one hour in an eight-
2 hour day, **with other limitations**. However, there is no
3 indication of worsening in the claimant's condition
4 over the intervening months nor is there evidence of
5 substantial improvement. The claimant's primary
6 complaint was related to fatigue as his back pain was
7 reported to be better. It appears that both Dr. Vides
8 and Mr. Segren [PAC] based their opinions on the
9 claimant's subjective statements and those statements
10 appear to be exaggerated as explained previously.
11 Therefore, Dr. Vides' opinion is given little weight.

12 (Tr. 26)(emphasis added.)

13 Some of the "other limitations" assessed by Dr. Vides in June of
14 2005 and referred to, but not described by the ALJ, include frequent
15 to constant interference with attention and concentration caused by
16 pain, fatigue or other symptoms, and likely absenteeism of more than
17 three times a month due to impairments or treatment. (Tr. 347-348.)
18 The form signed by Dr. Vides on June 24, 2005, differed from the
19 results of an examination completed on October 15, 2005, in that the
20 earlier form did not ask for an assessed exertion level. (Cf. Tr.
21 342-349 with Tr. 353-355.) More significantly, on both occasions Dr.
22 Vides described limitations which would preclude full-time competitive
23 employment, as he did again in May of 2006. (Tr. 360-365.) To the
24 extent the ALJ discredited Dr. Vides's opinions in June and October of
25 2005 as inexplicably inconsistent, the reason is not supported by
26 substantial evidence in the record.

27 The ALJ's second stated reason for discounting Dr. Vides's
28 assessment of plaintiff's limitations is that the assessment is based
29 on plaintiff's unreliable subjective statements. (Tr. 26.)

30 When presented with conflicting medical opinions, the ALJ must
31 determine credibility and resolve the conflict. *Matney v. Sullivan*,
32 981 F.2d 1016, 1019 (9th Cir. 1992). A physician's opinion may be

1 disregarded when it is premised on the properly rejected subjective
2 complaints of a plaintiff. See *Tonapetyan v. Halter*, 242 F. 3d 1144,
3 1149 (9th Cir. 2001). The opinion of Dr. Vides is based, however, on
4 more than plaintiff's statements. The medical opinions and evidence
5 (other than the opinions of agency physicians) largely support Dr.
6 Vides's opinion.

7 The ALJ appears to discount the opinion of treatment provider
8 Ernest Segren, PAC, because it too is based on plaintiff's unreliable
9 subjective complaints. (Tr. 26.) Mr. Segren assessed an RFC for light
10 work on March 21, 2003. (Tr. 139.) Six months later, he assessed
11 moderate impairment from DDD and chronic fatigue, noted plaintiff was
12 motivated to return to the workforce, and opined he could perform
13 sedentary work. (Tr. 146-147.) On December 23, 2003, after treating
14 plaintiff for nine months, Mr. Segren stated: "I believe this
15 gentleman to have a very poor prognosis for recovery to full work
16 capacity. His condition appears fixed/stable at this point." (Tr.
17 153.)

18 Several objective records support some of the opinions of both
19 Dr. Vides and Mr. Segren, particularly with respect to chronic low
20 back pain, apart from any statements by plaintiff: (1) a lumbar MRI in
21 April of 2003 reveals a posterior annular tear at L4-5 and L5-S1,
22 "which may elicit patient symptoms as a result of leukotriene release"
23 (Tr. 142); (2) significant paraspinal muscle cramping is noted on
24 examination by treating neurologist Hui-Juan Zhang, M.D., in May of
25 2003; in June 2003, Dr. Zhan assesses chronic low back pain with EMG
26 evidence of lumbar sacral radiculopathy bilaterally (Tr. 144, 264);
27 (3) Wing Chau, M.D., assesses bilateral sacroiliitis and mechanical
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1 back pain, as a result, gives cortisone injections and prescribes pain
2 medication from June of 2003-April 11, 2005 (Tr. 166-170; 265-279;
3 284); and (4) an MRI on October 19, 2005 shows mild to moderate
4 multilevel degenerative disc disease. (Tr. 356-357.)

5 To reject a treating physician's opinion which is contradicted by
6 other evidence, the ALJ must set forth specific, legitimate reasons
7 for doing so that are based on substantial evidence in the record.
8 *See Flaten v. Secretary of Health and Human Serv.*, 44 F. 3d at 1463.
9 The ALJ fails to give either clear and convincing or specific and
10 legitimate reasons supported by the record for discounting the
11 opinions of treating physician Dr. Vides.

12 **B. RFC**

13 In his hypothetical to the VE, the ALJ included the following
14 limitations:

15 We'll say he's limited to light exertional activities
16 now with additional functional limitations such that
17 he can occasionally stoop, crouch, crawl, kneel, balance,
18 or climb ramps and stairs. He's - he would have to
19 avoid ladders, ropes - climbing ladders ropes, and
20 scaffolds. He can occasionally reach overhead. And he
21 should avoid exposure to unprotected heights and
22 moving machinery. Now, let's see. There's a diagnosis
23 of COPD in here, too, so I'll say he would have
24 to avoid environments involving odors, fumes, dust, gases.
25 All right. Assume further that this individual is
26 afflicted with symptoms from various sources, including
27 mild to chronic pain, which is of sufficient severity
28 to be noticeable to him at all times, but he would be
able to remain attentive and responsive in a work setting
and to carry out normal work assignments satisfactorily.
Assume further that this individual takes medication for
relief of his symptoms, but the medications would not
prevent him from functioning at the level indicated and
that he would remain reasonably alert to perform the
required functions presented by his work setting. Let's
see. Assume further that this individual, while functioning
at the level indicated, would find it necessary to
change positions from time to time to relieve his
symptoms, perhaps shifting weight or and moving around.

1 (Tr. 424-425.)

2 The ALJ's hypothetical does not include the limitations on
3 concentration and higher than normal absenteeism assessed by treating
4 physician Dr. Vides.

5 **B. Remedy**

6 There are two remedies where the ALJ fails to provide adequate
7 reasons for rejecting the opinions of a treating or examining
8 physician. The general rule, found in the *Lester* line of cases, is
9 that "we credit that opinion as a matter of law." *Lester v. Chater*,
10 81 F. 3d 821, 834 (9th Cir. 1996); *Pitzer v. Sullivan*, 908 F. 2d 502,
11 506 (9th Cir. 1990); *Hammock v. Bowen*, 879 F. 2d 498, 502 (9th Cir.
12 1989). Under the alternate approach found in *McAllister v. Sullivan*,
13 888 F. 2d 599 (9th Cir. 1989), a court may remand to allow the ALJ to
14 provide the requisite specific and legitimate reasons for disregarding
15 the opinion. See also *Benecke v. Barnhart*, 379 F. 3d 587, 594 (9th
16 Cir. 2004)(court has flexibility in crediting testimony if substantial
17 questions remain as to claimant's credibility and other issues).
18 Where evidence has been identified that may be a basis for a finding,
19 but the findings are not articulated, remand is the proper
20 disposition. *Salvador v. Sullivan*, 917 F. 2d 13, 15 (9th Cir. 1990)
21 (citing *McAllister*); *Gonzalez v. Sullivan*, 914 F. 2d 1197, 1202 (9th
22 Cir. 1990).

23 Remand is appropriate because the ALJ fails to give specific and
24 legitimate reasons for disregarding the opinions of treating physician
25 Dr. Vides. Upon further hearing, the ALJ will weigh and analyze the
26 medical opinions of Dr. Vides, Dr. Zhang, Dr. Chau, and Mr. Segren,
27 and the other medical evidence, reevaluate plaintiff's credibility,
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determine plaintiff's RFC, and obtain a VE's testimony. The testimony of a medical expert may be helpful. The court expresses no opinion as to what the ultimate outcome on remand will or should be. The factfinder is free to give whatever weight to the evidence is deemed appropriate. See *Sample v. Schweiker*, 694 F. 2d 639, 642 (9th Cir 1982) ("Questions of credibility and resolution of conflicts in the testimony are functions solely of the Secretary").

CONCLUSION

The ALJ's decision is not supported by substantial evidence and free of legal error. A remand for further proceedings is the proper remedy. On remand, the ALJ will conduct a new sequential evaluation, make new credibility findings with specificity, make a new RFC determination, and take additional vocation expert testimony at step five.

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is **GRANTED**. The matter is remanded to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. 405(g).

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is **DENIED**.

3. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED July 28th, 2008.

1 s/ James P. Hutton

2 JAMES P. HUTTON
3 UNITED STATES MAGISTRATE JUDGE
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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO
SENTENCE FOUR 42 U.S.C. § 405(g)-14